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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	CC Docket No. 96-98

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REPLY COMMENTS

HYPERION TELECOMMUNICATIONS, INC.

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May 30, 1996

SUMMARY

Hyperion Telecommunications, Inc. ("Hyperion") strongly urges the Commission to adopt national rules to govern interconnection, reciprocal compensation and network unbundling arrangements between incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs"). Congress's goals in enacting the Telecommunications Act of 1996 (the "1996 Act") of stimulating facilities-based competition and accelerating competitive entry into the local exchange marketplace compels the establishment of a national regulatory framework. National rules are critical to stem current ILEC abuse of market power and threat of exploitation of unfair bargaining power in the Section 251 and 252 negotiation and arbitration processes.

The record in this proceeding supports adoption of national reciprocal compensation, network unbundling and interconnection rules designed to maximize facilities-based competition and minimize ILEC monopoly abuse. Requiring ILECs to price reciprocal compensation, unbundled network elements and interconnection based on incremental cost will best fulfill Congress's statutory mandate. Adopting bill and keep as an interim reciprocal compensation approach, moreover, will advance the Commission's and Congress's pro-competitive goals while maximizing both administrative and economic efficiencies in establishing incremental-cost based reciprocal compensation rates.

The adoption of national rules also will fuel competitive entry by providing a seamless regulatory framework for negotiation and establishment of nondiscriminatory and cost-based interconnection and collocation arrangements. Leaving local competition elements as pivotal as interconnection and collocation negotiation to the vagaries and

exigencies of disparate state commission oversight will inure to the benefit of entrenched ILEC monopolists. Absent a strong foundation of national rules, inactive or overactive state regulation will stymie the development of facilities-based competition and preserve the *status quo ante* to the benefit of ILECs.

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To: The Commission

REPLY COMMENTS

Hyperion Telecommunications, Inc. ("Hyperion"), by its attorneys, hereby submits its reply comments in response to the Commission's *Notice* in the above-captioned proceeding.[1/]

I. INTRODUCTION [*Notice*, Section II(A) ¶¶ 25-41]

The record in this proceeding supports adoption by the Commission of national rules to promote certain key principles necessary to the development of the goals of the Telecommunications Act of 1996 (the "1996 Act") of facilities-based competition with incumbent local exchange carriers ("ILECs") and efficient entry by competitive local exchange carriers ("CLECs"). The record resoundingly supports adoption of the Commission's tentative conclusion that a uniform federal framework be established to govern interconnection and reciprocal compensation negotiations pursuant to Sections 251 and 252 of the 1996 Act. Existing abuses in ILEC-to-CLEC interconnection arrangements require the establishment of strong national enforcement rules. Absent adoption of sufficient rules to safeguard against anticompetitive harm in ILEC interconnection

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1/ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, CC Docket No. 96-89 (released April 19, 1996) (the "*Notice*").

arrangements, unfettered ILEC bargaining power in the private negotiation process and disparate state requirements will stymie the development of actual, facilities-based competition.

II. NATIONAL STANDARDS FOR INTERCONNECTION AND UNBUNDLED NETWORK ELEMENTS WILL PROMOTE FACILITIES-BASED LOCAL COMPETITION. [*Notice*, Section II(A) ¶¶ 25-41]

The Commission should adopt its tentative conclusion that " ...national rules that are designed to secure the full benefits of competition for consumers" are the best way to further local competition.[2/] Hyperion urges the Commission to remain focused upon national rules that will provide the appropriate standards for interconnection and unbundled network elements. Congress has properly recognized that ILECs are in a dominant negotiating position with CLECs and has corrected this imbalance with federal pricing standards that duplicate competitive conditions. National rules will have the important effect of precluding ILECs from imposing unreasonable results on competitive entrants like Hyperion. No commenter has shown that competition can emerge without Commission's pricing principles that provide an essential benchmark for the states, reviewing courts and parties to individual negotiations.

III. BILL AND KEEP SHOULD BE ADOPTED AS AN INTERIM SOLUTION. [*Notice*, Section II(C)(5), ¶¶ 226-244]

The Commission should adopt bill and keep as an interim solution to pricing of call transport and termination under Sections 251(b)(5) and 252(d)(2) of the 1996 Act. National rules providing for reciprocal ILEC-to-CLEC arrangements for call transport and

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2/ Notice at ¶ 26.

termination and rates based on long run incremental cost ("LRIC") will facilitate the rapid deployment of facilities-based competition and efficient entry consistent with the goals of the 1996 Act.

Under Section 251(b)(5), ILECs are affirmatively obligated to provide transport and termination to requesting telecommunications carriers. Section 252(d)(2) further requires that ILECs make reciprocal compensation arrangements available for transport and termination based on the "additional cost" incurred by this exchange. The statute is unequivocal in this regard, and therefore self-effectuating.[3/]

Furthermore, long run incremental cost ("LRIC") is the economically and legally correct standard for assessing additional cost in setting reciprocal compensation rates. LRIC reflects the actual costs of providing additional capacity, so it is an entirely appropriate method for estimating additional cost.[4/] ILECs claiming that reciprocal compensation include recovery of operating costs, joint and common costs, and embedded costs have failed to demonstrate that these costs comply with the "additional cost" standard.[5/]

3/ It is well-settled that, when "the statute speaks with crystalline clarity . . . . [,] it is not *necessary* to look beyond the words of the statute." *See American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1568 (D.C. Cir. 1987) (quoting *TVA v. Hill*, 437 U.S. 153, 184 n.29, 98 S.Ct. 2279, 2296 n.29 (1978) (emphasis in the original)).

4/ *See, e.g.*, Comments of Cox Communications, Inc., filed in CC Docket No. 96-98, on May 16, 1996, at 25, 27 ("Cox Comments"); Comments of United States Department of Justice, at 33-35 ("DOJ Comments").

5/ *See* Comments of U S West, Inc., filed in CC Docket No. 96-98, on May 16, 1996, at 69-72 ("U S West Comments"); Comments of United States Telephone Association, at 78-84 ("USTA Comments").

Moreover, bill and keep should be established as the national interim policy for LEC-to-ILEC reciprocal compensation. The Commission has tentatively concluded and several states have held that bill and keep unquestionably provides the most administratively and economically efficient means of establishing incremental-cost based reciprocal compensation and encouraging facilities-based competition.[6/] In enacting Section 252(d)(2)(B)(i), Congress also has expressly given its blessing to bill and keep as an economically and legally sound pricing mechanism for ILEC-to-CLEC transport and termination rates. *See* 47 U.S.C. § 252(d)(2)(B)(i). The Commission must therefore adopt an interim bill and keep approach to pricing ILEC-to-CLEC transport and termination rates, as a transition to a long-term policy of mutual, reciprocal and symmetrical compensation rates based on LRIC.[7/]

6/ *See Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Notice of Proposed Rulemaking, CC Docket No. 95-185, FCC 95-505, at ¶ 60-62. (released January 11, 1996) ("*CMRS Interconnection Notice*"); *see also Notice*, at ¶¶ 227-229.

7/ ILEC claims that bill and keep would be an unconstitutional taking, moreover, are totally unsubstantiated. *See, e.g.*, USTA Comments, at 78-84. The ILECs have failed to make out any of the elements to support their claims of an unconstitutional taking: (i) economic impact of the regulation; (ii) interference with investment-backed expectations; and (iii) character of governmental action. *See Penn Central Co. v. United States*, 438 U.S. 104 (1978). First, to have a cognizable economic impact, a government's action must render property worthless, or virtually worthless. Yet, ILECs still would be able to provide all of the services they currently provide under a bill-and-keep regime, and would receive the further economic benefit of being able to terminate their traffic on competing networks at no cost. *See Connolly v. PBGC*, 475 U.S. 211, 223 (1986); *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2893 (1992). Secondly, the mere loss of anticipated profits does not constitute interference with investment-backed expectations. *See Andrus v. Allard*, 444 U.S. 51, 66 (1979). The third element refers to whether there has been a physical taking — *i.e.*, a physical invasion of LEC property — which is not at issue here. Bill and keep does not involve a physical invasion of LEC property. *See Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994); *see also Loretto v. Teleprompter Manhattan CATV*

IV. THE COMMISSION SHOULD ESTABLISH NATIONAL STANDARDS FOR NETWORK UNBUNDLING OBLIGATIONS THAT PROMOTE FACILITIES-BASED COMPETITION AND EFFICIENT ENTRY. [*Notice*, Section II(B)(2) ¶¶ 49-143]

The Commission must establish national rules to promote facilities-based competition by enforcing ILEC obligations to make unbundled network elements available at just, reasonable and nondiscriminatory prices pursuant to Section 251(c)(3) and 252(d)(1) of the 1996 Act. Reasonable and nondiscriminatory pricing of ILEC unbundled network facilities is key to the development of facilities-based competition. Adopting the correct pricing standard for unbundled network elements will reduce inconsistent state regulatory burdens and simplify the state's arbitration role by eliminating the need for states to engage in contentious debates over the appropriate economic model for interconnection and unbundled elements.[8/]

The Commission must establish a national rule that ILEC network elements and subelements must be fully unbundled to promote local competition. *See* 47 U.S.C. § 251(c)(3). Furthermore, the Commission should reject the cumbersome and multi-phase *bona fide* request process proposed by the ILECs[9/] for what it is: a monopolistic effort to

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Corp., 458 U.S. 419 (1982); *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994).

8/ See DOJ Comments at 26.

9/ *See, e.g.*, Comments of Bell Atlantic, filed in CC Docket No. 96-98, on May 16, 1996, at 17 ("Bell Atlantic Comments"); USTA Comments, at 13-18.

interpose anticompetitive regulatory barriers to delay entry by facilities-based carriers into the local exchange marketplace.[10/]

National rules also are necessary to prevent ILECs from imposing unjust or unreasonably discriminatory rates upon CLECs for unbundled network elements. Pricing of unbundled ILEC network elements should be based on incremental cost. Pricing unbundled ILEC network elements based on fully distributed cost, "embedded cost" or the discredited "efficient component pricing rule" ("ECPR"),[11/] as proposed by the ILECs,

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10/ ILEC claims that "technical feasibility" requires a *bona fide* request process are unpersuasive. Similarly, in the customer premises equipment ("CPE") market, AT&T attempted to stave off competition by interposing connecting arrangements ("CAs") and network control signaling units ("NCSUs") on non-AT&T CPE. *See AT&T Foreign Attachment Tariff Revisions*, 15 F.C.C.2d 605 (1968), *recon.*, 18 F.C.C.2d 871 (1969). AT&T claimed that CAs and NCSUs were necessary "protective" devices to be positioned between AT&T's network and customer-provided terminal equipment. Because CAs were not needed to connect AT&T-provided equipment and were comparatively expensive, they enabled AT&T to hinder competition in equipment markets. In the 1975 *Connecting Arrangements Order*, however, the Commission established a registration program to allow users to connect terminal equipment to the telephone network without using AT&T-supplied CAs, provided that the equipment or connecting protective circuitry had been certified by the Commission. *See Proposals for New or Revised Classes of Interstate and Foreign Message Telephone Service and Wide Area Telephone Service*, Notice of Inquiry, Docket No. 19528, 35 F.C.C.2d 539 (1972); First Report and Order, 56 F.C.C.2d 593 (1975) ("*Connecting Arrangements Order*"), *recon.*, 58 F.C.C.2d 716 (1976), *aff'd sub nom., North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 874 (1977); Second Report and Order, 58 F.C.C.2d 736 (1976) (the Commission included private branch exchanges, key telephone systems and main station telephones in the registration program).

11/ The "efficient component pricing rule" holds that a monopolist should be able to recover all of its expected monopoly profits from its competitors if those competitors must obtain some elements of their service from the monopolist. The *Notice* correctly rejects the ECPR as an unreasonable pricing theory. *Id.* at ¶¶ 147-8. The theory is not only unreasonable, it is harmful to the emergence of competition because it artificially inflates the prices of competitors.

would improperly and illegally guarantee an ILEC future profits and shield ILECs from the effects of lawful competition.[12/]

In addition, the Commission must make a distinction between pricing of unbundled network elements, as opposed to unbundled network loops. In response to the comments in this proceeding, Hyperion deems it necessary to clarify its initial position with respect to pricing of unbundled network elements to fine-tune the cost standards to particular types of unbundled elements in a manner that will best promote facilities-based competition. Unbundling of network links should be subject to a cost standard that promotes facilities-based competition. Total service long run incremental cost ("TSLRIC") provides the proper economic cost model for unbundled network elements — other than links — because services interconnected to links do not entail the construction of facilities by a CLEC.[13/] In contrast, unbundled network links implicate the build-out of competitor facilities and must be priced in a manner that encourages such facilities build-out. A fully allocated cost measure is a proper economic cost standard to promote facilities-based competition in the pricing of unbundled network links.[14/]

12/ *See Market St. Ry. Co. v. Railroad Comm'n of Calif.*, 324 U.S. 548, 566 (1945).

13/ *See* Comments of National Cable Television Ass'n, Inc., in CC Docket No. 96-98, filed on May 16, 1996, at 49-53.

14/ *See* Comments of Cox Communications, Inc., in CC Docket No. 96-98, filed on May 16, 1996, at 30.

V. THE COMMISSION SHOULD ESTABLISH NATIONAL RESALE RULES THAT PROMOTE THE 1996 ACT'S GOAL OF PROMOTING FACILITIES-BASED COMPETITION. [*Notice*, Section II(B)(2)-II(C)(1) ¶¶ 49-197]

The Commission should fashion national resale obligations pursuant to Sections 251(b)(1) and 251(c)(4), and resale pricing policies pursuant to Section 252(d)(3), to promote facilities-based competition. Obligations imposed upon ILECs for resale should not be subject to deep, uneconomic discounts. Moreover, CLECs should not be required to provide resale at discounts or under the same terms and conditions to which ILECs are subject.

With respect to full service lines, the Commission should not require that ILECs establish deep discounts under the wholesale pricing standard set forth in Setion 252(d)(3) of the rules. *See* 47 U.S.C. § 252(d)(3). Artificially lowering the price of full service lines would fail to encourage facilities-based competition. Indeed, it will discourage CLECs from undertaking the necessary expense to build out and operate competitive facilities-based operations.

In addition, the Commission should not impose resale obligations on CLECs. Because the CLEC market is subject to competition, there is no statutory or economic basis for imposing the same resale obligations upon CLECs as upon ILECs. *See* 47 U.S.C. § 251(b)(1). Congress intended that resale requirements be employed as a regulatory tool to open up ILEC networks to competition. *See* 47 U.S.C. § 251(c)(4). At this juncture, there is no necessity to adopt costly or intrusive rules for the provision of resale by CLECs.

VI. THE COMMISSION SHOULD ADOPT RULES TO PREVENT ILEC ANTICOMPETITIVE ABUSE IN INTERCONNECTION AND COLLOCATION ARRANGEMENTS. [*Notice*, Section II(B)(2) ¶¶ 49-143]

It is critical that the Commission establish procedures for prompt resolution of interconnection disputes. LECs have an undeniable incentive not to cooperate with CLECs and only prompt dispute resolution procedures will control this problem. If the Commission's rules allow LECs to enter into agreements and breach them with impunity, the pro-competitive promise of the 1996 Act will not be fulfilled.

It has been Hyperion's experience that incumbent LECs have both the incentive and the ability to "nickel and dime" their competitors through a pattern of non-cooperation. Hyperion has encountered repeated problems obtaining access to an AT&T point of presence that was located in a NYNEX central office. Only after months of exchanging letters and telephone calls with NYNEX representatives and meetings with state and federal regulators was Hyperion able to resolve what should have been a simple building entry matter. Thus, in its role as "landlord" to AT&T in this case, NYNEX was able to delay for months having to compete with Hyperion for AT&T's access traffic.

In addition to establishing national rules governing interconnection of competing networks, the Commission must from the outset be willing to exercise its authority under Section 253 to remove barriers to entry maintained by states and municipalities. *See* 47 U.S.C. § 253. Many state and local requirements may not be sufficiently onerous to warrant the time and expense of filing for preemption, but the effect of these requirements is to delay substantially the onset of competition. For example, immediately following the passage of the 1996 Act, Hyperion's operating partnership in Kentucky filed a request with

the state commission to remove a restriction contained in the partnership's certificate of public convenience on the provision of intraexchange services. The state commission decided to hold the request in abeyance pending completion of its local competition rulemaking based on "concerns" regarding universal service. The state commission is now considering a proposal made by Hyperion on reconsideration to permit entry of competitive local carriers subject to a bond or escrow payment that would be considered a "downpayment" on any future universal service contributions.

Hyperion has encountered similar delays in New Jersey, where it cannot use facilities leased from cable operators without first obtaining approval of the lease by the Board of Public Utilities. New Jersey is the only state where Hyperion operates that requires the prior approval of leases with cable operators. In the past it has taken carriers years to obtain such approval and then only subject to restrictions on the facilities that are subject to the lease. Not only is this type of micro-management well beyond what is required to "protect" cable subscribers, it is plainly antithetical to the pro-competitive policies of the 1996 Act.

Municipalities, particularly in the State of Tennessee, also have erected barriers to entry by competitive local exchange carriers, particularly in situations where the municipality controls the electric company and can dictate the terms of pole attachments as well as access to public rights-of-way. In one market, for example, construction of the fiber optic network to be used by Hyperion's operating partnership has been delayed for months as it has attempted to obtain pole attachments from the municipally-controlled electric company. Pole attachments also have presented problems in another, where the cable

operator from whom Hyperion's operating partnership is leasing facilities has encountered resistance from Bell Atlantic.

The types of problems Hyperion has encountered with state and municipal regulators are not unique, as demonstrated by ALTS in an earlier filing. While the Commission is now considering whether to preempt some of the more egregious cases of states violating the letter and the spirit of the 1996 Act (such as the restrictions contained in Texas law or the interminable delay in obtaining certification in the District of Columbia), as a practical matter most CLECs do not have the resources to seek preemption of every regulatory requirement that exceeds the scope of state and local authority under the 1996 Act.[15/]

In enacting the 1996 Act, Congress found that elimination of state barriers to entry is in the public interest. 47 U.S.C. § 253. Congress, having made this public interest determination, it is now up to the Commission to take decisive, prophylactic action to establish a uniform federal regulatory framework for competitive entry and to eliminate onerous and costly state barriers to entry, such as those which Hyperion has encountered. Consequently, unless the Commission states unequivocally that these types of barriers will not be permitted, CLECs will be forced to spend their time, financial and administrative resources fighting battles with state and local regulators rather than providing a competitive alternative to consumers.

15/ *See* Albert K. Karr, *Texas Defies Washington in Phone Deregulation, Protecting Its Local Bell Against Giant Rivals*, WALL STREET J., May 2, 1996, at A2; Herb Kirchoff, *Force Open Local Competition in D.C., MFS Tells FCC*, STATE TEL. REG. REP., May 16, 1996, at 1.

VII. CONCLUSION

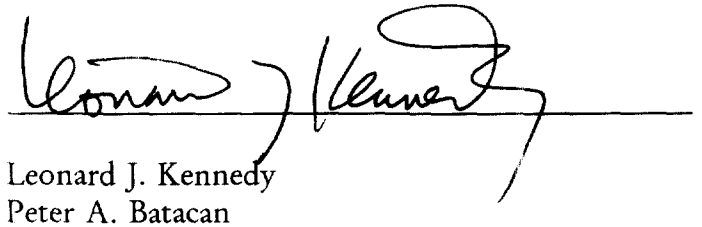
The Commission must act quickly to implement Congress's vision set forth in the 1996 Act of stimulating true facilities-based competition by establishing national rules to govern pricing of reciprocal compensation and network unbundling. Furthermore, requiring national standards for the development of interconnection and collocation arrangements will best promote the rapid entry of CLECs into the local exchange marketplace. As Congress has stated, the 1996 Act is designed "to provide for a pro-competitive, deregulatory *national* policy framework designed to . . . open[] *all* telecommunications markets to competition."[16/] Adopting a national framework pursuant to the interconnection provisions of Sections 251 and 252 of the 1996 Act to limit ILEC abuse

16/ S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (emphasis added).

of monopoly power and stimulate CLEC entry is the single most important step the Commission can take today to help make Congress's vision a reality.

Respectfully submitted,

HYPERION TELECOMMUNICATIONS, INC.

By: 

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May 30, 1996

CERTIFICATE OF SERVICE

I, Tracie R. Ivey, a secretary at the law firm of Dow, Lohnes & Albertson, do hereby certify that on this 30th day of May, 1996, I caused copies of the foregoing "Reply Comments of Hyperion Telecommunications, Inc." to be served via hand-delivery, to the following:

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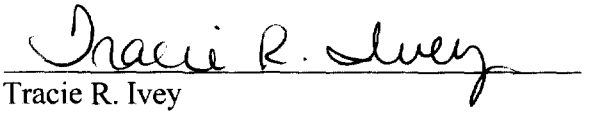

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